United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1244

B
P/S

In The

United States Court of Appeals

For The Second Circuit

No. 75-1244

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

NICHOLAS L. BIANCO,

Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of New York

BRIEF FOR DEFENDANT-APPELLANT

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Defendant-Appellant
522 Fifth Avenue
New York, New York 10036
(212) 687-4100

JAMES M. LA ROSSA
GERALD L. SHARGEL
Of Counsel

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D.)

TABLE OF CASES

TABLE OF CASES (CONT'D.)

TABLE OF CASES (CONT'D.)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75 - 1244

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

NICHOLAS L. BIANCO,

Defendant-Appellant.

BRIEF FOR APPELLANT NICHOLAS L. BIANCO

Preliminary Statement

The Appellant, Nicholas L. Bianco, appeals from a Judgment of Conviction entered against him in the United States District Court for the Eastern District of New York, adjudging him guilty of five counts of violating Title 26, United States Code, Section 7203, for his alleged failure to file an income tax return for the years 1967 through 1971. As a result of

this conviction, the Appellant was sentenced to consecutive terms of one (1) year imprisonment on each of counts one through four. On count five, Appellant received a suspended term of imprisonment and was placed on probation for a period of five (5) years. In addition, Appellant was fined $10,000 on each of the five counts equalling a total fine of $50,000. The Appellant is presently at liberty on bail pending this appeal.

The Information appears on page five (5) of Appellant's Appendix.

STATEMENT OF THE FACTS

This five-count Information alleged that during the calendar years 1967 through 1971, the Appellant, having sufficient gross income to require the filing of a federal income tax return, failed to do so.

The Government's proof against Bianco was circumstantial. It relied upon the "cash expenditure" theory in order to prove that Appellant was earning taxable income during this period and yet, failed to file the requisite returns.

THE FAILURE TO FILE RETURNS

Rose De Cara, an Internal Revenue Service agent, testified that a search of her agency's records failed to reveal income tax returns for Bianco for the years 1967 through 1971. (I, T 24 - 25)[1] Nor were there any returns for Bianco's wife, whom he married in 1968. (I, T 30 - 31) Richard Pellard, another Internal Revenue Service agent, testified that a nation-wide search conducted by him also failed to disclose the filing of income tax returns for these years. (A 463 - 469)

OPENING NET WORTH

It was, of course, the Government's burden to prove that the monies expended during the years in question were not drawn from previously accumulated capital. This proof was especially critical where, as will be seen, the expenditures shown were only moderate.

Alan Young, a New York attorney, testified that in September of 1965 he obtained a $436.40 judgment against Bianco

---

[1] The letter "T" refers to the trial transcript while the letter "A" refers to Appellant's Appendix. Because the transcript was not numbered sequentially, "T" referances are prefaced by the volume number in which that page appears.

on behalf of the Beach Haven Management Corporation. (A 165 - 172) This judgment followed an alleged breach of an apartment lease agreement between the plaintiff and Bianco. (A 172) Some time thereafter, Young's law firm referred the matter to Samuel Sezzen, an attorney specializing in collections, in an attempt to have the judgment satisfied. (A 198) Sezzen testified that after accepting the Bianco file, he served a restraining notice on a branch office of the Chemical Bank located at 17 Hamilton Avenue in Brooklyn. (A 200) This notice was dated January 21st, 1966. (A 201) On re-direct examination, Sezzen explained that he focused on the Chemical Bank because it was "the nearest bank to where Mr. Bianco lived at the time." (A 212)

Quite curiously, Sezzen failed to make inquiry at the Manufacturers Trust Company, which was supplied by Bianco as a bank reference on the original application for the apartment. (A 209) Although Sezzen asserted that he followed "established procedure" in order to collect the judgment (A 201), no assets were discovered. Finally, in July of 1970, the file was returned to Young's law firm. (A 207) Earlier cross-examination of Mr. Young revealed that there had been no personal service of summons and complaint on Mr. Bianco

and that a preceding claim letter regarding the matter had never been received by him. (A 183)

The Government sought to further illustrate Bianco's financial condition prior to January 1st, 1967 with the testimony of Fred Betancourt. (A 216) Betancourt, a collection manager with the General Motors Acceptance Corporation (GMAC), testified that Bianco had been making payments on a 1965 Buick automobile but that in December of 1966, the car was repossessed. (A 222) Betancourt, however, could not state why the auto had been repossessed. Any inference that the repossession was attributable to a shortage of assets or available cash was negated by the later testimony of a Buick dealer, who testified that two weeks prior to the repossession, Bianco purchased a 1967 Buick with a down payment of $1,125. (A 252) It was also established that in the Fall of 1966, Bianco received a substantial automobile loan to purchase the new car. (A 260 - 261) Dominick Borrello, an employee of the Bankers Trust Company, testified that on November 25th, 1966, a loan was made to Bianco in the amount of $4,583.40. (A 230)

CASH EXPENDITURES

The Government called more than twenty witnesses to

establish that during the years 1967 through 1971, Appellant maintained a relatively comfortable standard of living through identifiable cash expenditures. Witnesses called by the Government established such routine expenditures as automobile payments (A 250 - 256), utility bills (III, T 9 - 22), hospital bills (III, T 14), a hotel bill (III, T 34), school tuition (III, T 36), rent (III, T 46), insurance payments (III, T 72, 191, 228, 240), doctor bills (III, T 77, 103), home improvements (III, T 93, 198) and entertainment expenses. (A 344)

Based on the testimony at trial, Michael Marchitello, an Internal Revenue Service agent and accountant, computed the amounts expended by Appellant as follows:

1967	$ 4,284.68
1968	5,924.99
1969	9,898.25[2]
1970	8,916.49
1971	10,217.01

---

[2] This figure was then adjusted to $6,898.25. (A 490)

APPARENT SOURCES OF INCOME

The Government's proof concerning the source of income during the years 1967 through 1971 was scarce and uncertain. Essentially, the prosecution focused on intermittent representations by Bianco throughout this period that he was employed by the E Z Floor Cleaning Company of Brooklyn, New York. These representations were obviously made in furtherance of Bianco's effort to obtain credit. For instance, on a loan application to Bankers Trust Company in 1968, Bianco stated that he was employed by the E Z Company at 329 Carroll Street in Brooklyn. (II, T 104 - 105) This same company was furnished as a reference on a hospital form when Appellant's wife gave birth. (III, T 17 - 18) The E Z Company also appeared on insurance applications. (III, T 75)

Louis Nahmias, the Internal Revenue Service special agent in charge of the investigation, testified, however, that he was unable to determine whether such a business existed. Nahmias stated that:

> "Some of the loan applications that I read indicated that Mr. Bianca (sic) was employed by or was self-employed by Easy Cleaning and I made an attempt to determine whether this was a business of Mr. Bianca's (sic), and I was not successful in determining, in determing whether such a business really existed." (A 283 - 284)

Further questioning produced the following:

"Q All right, sir.

Can you tell us what other steps you took during the course of this investigation?

A Well, when I decided that, I attempted to find some specific items of income on the part of Mr. Bianco.

Q What types of income?

A Specific items, any kind, any type, whether it be salary or self-employment income."

* * *

"Q You are referring to evidence of payment made to Mr. Bianca?

A Yes.

Q Were you able to find any evidence of any such payments?

A Very small, very light." (A 286 - 287)

The only other evidence pertaining to a source of income dealt with a loan made to one Joseph Rabinovich. Shayne Peters, Appellant's girlfriend prior to his marriage, introduced Bianco to Rabinovich. (A 368) In the Spring of 1967, Rabinovich obtained a $10,000 loan through Bianco. (A 370, 436 - 437) The interest payments on this loan amounted to $250.00 per week. (A 439) These interest payments were made for a period of eight weeks until the principal was repaid. (A 439 - 441)

Cross-examination of Rabinovich elicited the fact that two other men had actually produced the $10,000 and that Bianco had merely served as a conduit for the loan. (A 453 - 455)

EXCLUSION OF NON-TAXABLE SOURCES OF INCOME

Internal Revenue Service Agent Nahmias was assigned to the Bianco case in September of 1971. (A 274) At that time, some three months prior to the end of the last calendar year charged in the Information, Nahmias began a search to determine whether Bianco had any accumulated cash on hand or non-taxable sources of income. After circulating inquiries to some 100 banks in the area of Bianco's Brooklyn residence, Nahmias was unable to uncover any record assets. (A 277 - 278) A check of the County Clerk's office in Kings County failed to reveal any real property interests in Mr. Bianco's name. (A 280) Randomly, Nahmias checked the brokerage firm of Merrill, Lynch, Pierce, Fenner & Smith to determine whether Bianco held an account. This search, too, failed to reveal any assets. (A 280 - 281) Proof at trial revealed that after his marriage, Bianco maintained his residence in Providence, Rhode Island, his birth place and home of his deceased parents.

Nahmias testified that he checked the probate records of the Appellant's father's estate and failed to reveal any assets. (A 289) The thoroughness of Nahmias' investigation is one of the points to be raised in this appeal.

STATUTES INVOLVED

Title 26, United States Code, Section 7203 provides as follows:

> "§ 7203. Willful failure to file Return, supply information, or pay tax.
>
> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851."

QUESTIONS PRESENTED

1. On the cash expenditure method of proof, did the

Government offer sufficient proof of Appellant's opening net worth?

2. Whether the Government successfully met the "heavy burden" of proving that the case against Appellant was not developed from immunized Grand Jury testimony?

3. Did the Government sufficiently demonstrate that Appellant's cash expenditures did not arise from non-taxable sources?

4. Was it error to admit evidence that Appellant had failed to file tax returns in prior years to show that he had not earned sufficient income during these years to accumulate the cash he expended during the years charged in the Information?

5. Were Appellant's Fourth Amendment rights violated by a ten-year mail cover?

POINT I

UTILIZING THE CASH EXPENDITURE METHOD OF PROOF, THE GOVERNMENT FAILED TO OFFER SUFFICIENT EVIDENCE OF APPELLANT'S OPENING NET WORTH.

The Government's case against Bianco developed under the cash expenditure theory of proof. (I, T 37 - 38) The burden

cast upon the Government in utilizing this method is not unfamiliar. The cash expenditure theory is simply a variant of the net worth method of establishing unreported taxable income approved more than a decade ago in Holland v. United States, 348 U.S. 121 (1954). This circumstantial type of case was described by the First Circuit Court of Appeals in Taglianetti v. United States, 398 F.2d 558, 562 (1st Cir., 1968):

> "The cash expenditure method is devised to reach such a taxpayer by establishing the amount of his purchases of goods and services which are not attributable to the resources at hand at the beginning of the year or to non-taxable receipts during the year."

Whether the Government proceeds under the net worth theory or, as in this case, the stepchild cash expenditure theory, the proof must establish, with "reasonable certainty", an opening net worth to serve as a starting point from which to properly assess the inferential source of monies expended or increase in net worth. This proposition, which is found in the Taglianetti case, was recently cited with approval by this Court in United States v. Fisher, --- F.2d --- (2nd Cir., June 30, 1975), sl.op p.4521, 4530.

The logic behind this requirement can be clearly seen. The Government cannot simply show that cash expenditures, of

whatever size, were made during the years charged in the hope that the jury would infer that they were made out of taxable income. This proof hangs in mid-air unless the Government can first establish, with some degree of certainty, the sources available to the taxpayer at the beginning of the calendar year in question. Obviously, another suitable gambit would be for the Government to show that Appellant was without accumulated assets at the beginning of the period to negate the possibility that monies spent were drawn from a previously accumulated source. Marcus v. United States, 422 F.2d 752, 755 (5th Cir., 1970).

As revealed in his opening statement to the jury, this is what the Government attorney had in mind. He would attempt to show that prior to January 1st, 1967, the beginning of the first calendar year charged in the Information, Bianco was without assets. Anticipating his proof, the prosecutor stated that:

> "We have rather a situation where the defendant was apparently without assets at the end of the year 1966. To illustrate this, his car was repossessed during that year, a judgment had been obtained against him sometime previously in 1965 -
>
> MR. LA ROSSA: I object to this.

THE COURT: This what he is going to prove.

MR. MC CAFFREY: (Addressing the jury) - and that judgment proved to be uncollectable, indicating that the defendant was without assets at the beginning of that period, which is the beginning of 1967."

* * *

"Now we are not in a position and cannot show exactly how much the income of the defendant was during each of those years from 1967 to 1971. We can, however, show some of the expenditures that the defendant had during that period, and in light of the fact that he was apparently without assets at the beginning of 1967, these expenditures must have constituted income." (A 162 - 163)

Nicholas Bianco contends on appeal that the best intentions of the prosecutor were never realized. To the contrary, the proof at trial revealed that Bianco did indeed have assets prior to January 1, 1967. Consequently, the Government failed to establish with any degree of certainty an opening net worth.

A closer review of the Government's evidence is in order. As noted, the Government relied on an outstanding judgment against Bianco and the repossession of his car to portray a

man who had fallen on hard times.[3] The reasoning, therefore, was that it was "reasonably certain" that Bianco did not have an accumulation of funds from which he could spend some $36,000 during the ensuing five-year period.

In evaluating this evidence, however, it appears that the Government's evidence was not quite what they would have liked it to have been. Fred Betancourt, the representative from GMAC, testified to the repossession of Bianco's car on December 8th, 1966. (A 222) Betancourt's records did not disclose why the car had been repossessed, but the Government obviously wanted the jury to infer that Bianco had failed to make payments. (A 222 - 223) Upon closer questioning by the Court, the witness admitted that autos are "sometimes" repossessed because the customer doesn't want to pay for the car and gives the car back." (A 223) Standing alone, this testimony might have been marginally convincing to support the inference that Bianco was unable to pay. However, on the cash expenditure side of

---

[3] The Government also relied upon the fact that defendant had not filed tax returns for the years 1963 through 1965 to show that during this period, he had not earned sufficient income to report and, therefore, could not have accumulated capital. The propriety of admitting this evidence is a point to be discussed infra.

the Government's case, it was established that two weeks earlier, on November 25th, 1966, Bianco received a $4,500 loan from the Bankers Trust Company for the purchase of a new automobile. (II, T 93) Herbert Kaplan, the Buick dealer, testified that at this time, Bianco made a cash down-payment of $1,125 on the new car. This, then, would unquestionably negate any finding that Bianco, at the "starting point", had no assets.[4]

Perhaps more significant from the Government's viewpoint is the uncollected $400 judgment obtained by the Beach Haven Management Company in 1965. (A 166) It will be remembered that this judgment was obtained as a result of Bianco's breach of a lease agreement on an apartment he had rented. (A 172) Under the Government's theory of the case, the fact that this judgment "proved to be uncollectable" would tend to indicate that "the defendant was without assets at the beginning of that period, which is the beginning of 1967."[5] Here, too, however, the Government's proof rested on a rather uncertain foundation. Cross-examination of attorney Young revealed that

---

[4] Also inconsistent with the Government's position that Bianco was without assets during this period, is the fact that he abandoned a 1965 Buick and purchased a 1967 Buick which included an array of luxury options. (A 252 - 253)

[5] Government opening. (A 163)

Bianco received neither notice of the claim nor personal service of the summons and complaint which instituted the lawsuit. (A 183 - 143)

The only other evidence to support the Government's claim that Bianco lacked assets at the starting point, was attorney Sezzen's "search" for assets from which to satisfy this judgment. This "search", however, was, according to the testimony, conducted in a highly haphazard and aimless fashion.[6] Sezzen testified that he served a restraining notice on a Chemical Bank branch located at 17 Hamilton Avenue in Brooklyn. (A 199 - 200) Why Sezzen chose that bank was explained on redirect examination as follows:

> "Q Was there anything in that file that you received indicating that Bianco had an account at the Chemical Bank?
>
> MR. LA ROSSA: Objection.
>
> Q When you received it.
>
> THE COURT: No, I'll allow it.
>
> A My recollection is that it was the nearest bank to where Mr. Bianco lived at the time.

---

[6] Considering the relatively small amount of the judgment, it is not surprising that the claim was handled in such a pedistrian manner.

I issued that subpoena based on thac information.

Q Was there any information in the file that he had an account?

A No." (A 212)

Other than this one particular step directed at the Chemical Bank, Sezzen could only testify that he followed his "general procedure" in attempting to uncover any assets held by Bianco. This procedure was described by Sezzen as follows:

> "We check out references submitted by the tenants. We check his bank references, if any. We also issue information subpoenas to current landlords for anybody who might be associated with the judgment debtor." (A 202)

This procedure proved fruitless and the file was returned to the referring law firm in July of 1970 with a negative result. (A 207) Curiously, however, the attorney witness seemingly failed to explore a bank reference supplied by Bianco on the lease application. (A 209) Although portions of the file had been destroyed and the passage of time understandably dimmed the attorney's memory, on the totality of his testimony, it was impossible to conclude with any "reasonable degree of certainty" what assets Bianco had or didn't have during this period.

Giving the Government their due and considering the evidence in the light most favorable to them, Glasser v. United States, 315 U.S. 60 (1942), Sezzen's testimony, considered in a vacumn, may arguably have entitled the jury to conclude that Bianco had little or no assets at the "starting point." However, Sezzen's testimony can only be considered in the context of the Government's entire case. When this broader view is applied, the Young-Sezzen testimony simply fails to support the proposition for which it was offered.

To understand this assertion, one need only examine the testimony of Shayne Peters, another witness called by the Government to prove cash expenditures during 1967. In the ordinary doldrums of a cash-expenditure tax case with the usual parade of vendor-witnesses, Shayne Peters' testimony contained an unusual degree of interest. Miss Peters, Bianco's girlfriend at the time, had the rather extraordinary habit of recording the time, date and place of each meeting with Appellant. (A 345 - 347) Her dinner dates with Bianco read like a gourmet guide to New York City. (A 344 - 368) Although the prosecutor focused his questions on cash expenditures during 1967, Miss Peters distinctly recalled that she met Bianco on October 28th,

1966. (A 344 - 345) This, it should be remembered, was at the time when the Government alleged that Bianco was without assets. It was on this premise that the Government laid the foundation for the subsequent cash expenditures. However, cross-examination of Miss Peters on the time period between their first meeting and December 31st, 1966, effectively destroyed any contention by the Government that Bianco was without significant assets at the "starting point". The following questions and answers dramatize the point:

"Q Sometime during the year 1966, did he give you a gift?

A Yes, sir.

Q Was that gift a diamond pin from Tiffany's?

A Yes.

Q No question in your mind that was during the year 1966?

A It was right after I met him.

Q Sometime between October 1st of 1966 -

A And Christmas. It was a Christimas gift.

Q It would have been sometime in December of 1966?

A Yes.

Q Do you know how much that diamond pin was worth?

A It wasn't a diamond pin. It was gold with a diamond.

Q Gold colored diamond pin. How much was it worth; do you know?

A Well, I don't question the value of the gift, but it would have to be somewhere in the $500 area.

Q And during the year 1966, from the time you met him in October until the end of the year, will you tell us how many times he took you out to dinner during that period?

A Amount of times?

Q Yes.

A We were constantly together except when he was away.

Q Will you refer to your notes please and tell me, if you can, how many times he took you out to dinner from October 1st, 1966 until December 31st?

A The number of times?

Q Yes." (A 379 - 380)

* * *

"Q So we don't confuse the jury, tell us how many times he took you to a restaurant for dinner from October, 1966 until December 31st, 1966?"

* * *

"A Ah hm. Thirty approximately.

Q Thirty occasions. On those those thirty occasions, did Nicholas Bianco pay -

A On each occasion?

Q Yes.

A To me, yes.

Q During the year 1966, did he buy you any gifts other than that diamond pin or that gold pin with the diamond? Did he buy you a dress, for example?

A He gave me a dress.

Q Did he give you any money from October 1st, 1966 until December 31st, 1966?

A Yes, he did.

Q How much did he give you?

A Approximately - I couldn't tell you in added figures.

Q Just give us your best recollection of what it was.

A Well, if he had it and if I needed it, he would give me never less than $100.

Q How many times did that happen?

A I never wrote it down.

Q What's your best recollection now? How many times did it happen from October 1st, 1966 until December 31st? Did it happen all at once?

A No. It happened more in 1966 than in - 67.

Q How about - 66?

A I would say he gave me money to shop for food or for incidentals, but nothing spectacular or -

Q How many times?

A I can't tell you in number.

Q More than once?

A Certainly.

Q More than five?

A Certainly." (A 383 - 384)

In focusing on Bianco's spending habits in 1966, counsel was attempting to emphasize that the Government's "starting point" was faulty. (A 385) In so doing, the defense left a gaping hole in the Government's case. The open and now unanswerable question is how did the Government prove that the expenses, made by Bianco in 1967 and the ensuing years, did not spring from a prior accumulation of cash which his own free spending evidenced possession of in 1966? The fact that this question cannot be answered leads to the inexorable conclusion that the Government did not prove its case.

Moreover, the fatal flaw in the Government's case is even

more prominent. The Court allowed the Government, over objection, to prove that Appellant had not filed tax returns in the years 1963 through 1966. (A 470 - 474) A distinction was drawn between his failure to file in 1963 through 1965 and the year 1966. The years 1963, 1964 and 1965 were introduced to show that Appellant apparently did not earn in excess of $600 during those years and, therefore, it would be unlikely that he accumulated a cash hoard which he spent during the calendar years charged in the Information (A 471) Appellant claims that admission of this evidence was error and this is a point to be dealt with in another part of this brief. Failure to file in the year 1966, however, stands on a different footing and is relevant to Appellant's claim that the Government failed to prove, with reasonable certainty, an opening net worth.

During cross-examination of Shayne Peters as to Bianco's spending habits during the Fall of 1966, the Court cautioned defense counsel that he was opening the door to the introduction of 1966 as a prior similar act. United States v. Deaton, 381 F.2d 114 (2nd Cir., 1967). (A 385) As noted earlier, defense counsel explained that he was merely trying to disprove the Government's announced theory that Bianco was without

assets prior to January 1st, 1967. (A 385) Later, the prosecutor seized the Court's suggestion and during colloquy, requested that the year 1966 be treated in this manner.

"THE COURT: And now, what position do you want to take with respect to at least as to 1966.

MR. MC CAFFREY: With respect to 1966, in view of gifts to Shayne Peters by the defendant and in view of gifts of money to which she testified in view of expenses involved in dinner dates and things of that nature, I think that would clearly come within the prior similar act group.

THE COURT: You want such an instruction at the time?

MR. MC CAFFREY: Yes. I so request, your Honor.

THE COURT: All right." (A 451)

An instruction as to the use of a prior similar act was given to the jury at the time of its introduction. (A 470 - 472)

A similar instruction was given in the Court's charge:

"With respect to the calendar year 1966, you will recall that on the cross-examination of Miss Peters she testified to various expenditures made by the defendant during the months of October, November and December of that year. If you find that such expenditures have exceeded $600, and if you further find that the source of such expenditures was taxable income as distinguished from inheritances, gifts, loans or prior accumulated funds, then the government says that they have shown an earlier offense of like nature and that you should consider it on the question of

defendant's knowledge, wilfullness, state of mind or intent." (A 511 - 512)

Even without regard to the fact that that intent, state of mind or wilfullness had not become an issue in the trial sufficient to allow the introduction of a prior similar act, Appellant contends that this approach was entirely improper. This is so because the posture taken with regard to 1966 impaled the Government on the horns of a dilemma. Simple logic prohibits the Government from, on the one hand, arguing that they proved their case by developing a no-asset starting point on January 1st, 1967 and on the other hand, introducing evidence of a prior similar act by stating that Bianco's free spending in 1966 reflected unreported income.

The Government wanted to lay a foundation for its cash expenditure proof by showing that Bianco could not satisfy a $400 judgment in 1966. The defense elicited that at the time Bianco had purchased a $500 Tiffany pin and was able to freely afford the luxury of good taste. Faced with this obvious contradiction, the Government pragmatically abandoned its original starting point theory and sought to turn these expenditures to its advantage. With this advantage, the Government must now realize that there was a complete failure of proof as to

an opening net worth.

Even more confusing was the Court's charge with regard to 1966 that, "If you further find that the source of such expenditures was taxable income as distinguished from inheritances, gifts, loans or prior accumulated funds . . ." then they can find an earlier offense of a "like nature." (A 511) There was, however, no means by which the jury could then determine whether the expenditures were made from taxable income or prior accumulations. Plainly stated, the Government had then lost their grip on the starting point and the proof of cash expenditures was floating about without a relevant foundation.

Analysis of relevant case authority amply demonstrates the Government's failure to prove with reasonable certainty an opening net worth in the instant case. In Friedberg v. United States, 348 U.S. 142 (1954), the Government's proof focused on a twenty-year history of defendant's finances preceding the tax years in question. There, the Government relied upon judgments, admissions of net worth and amounts of previous income. There, without question, the defendant's prior financial condition was placed before the jury in such a manner as to make it highly unlikely that the defendant had

accumulated a cash hoard. In the case at bar, the opposite is true. At the end of the Government's case, it was clear that Appellant had accumulated assets.

In United States v. Penosi, 452 F.2d 217 (5th Cir., 1971), the Court explained that where the Government does not prove a taxable source of income as it did not in the present case, they must prove "to a reasonable certainty that the income expended did not spring from prior accumulations or earnings for which the defendant would be liable in taxes."[7] In Penosi, the Internal Revenue Service agent testified that he found defendant's opening net worth to consist of only one encumbered automobile. In the instant case, there was no evidence as to what assets the Appellant held at the starting point. Only through repossession of his car and a $400 uncollected judgment was the jury invited to infer that there were no assets. As argued above, the effect of this proof faded and finally evaporated during the course of the Government's case. The proof at bar is also substantially different and patently weaker than, for example, the proof of opening net worth in United

---

[7] Appellant does not suggest that proof of a source of income is a requirement in the Government's case. United States v. Schipani, 414 F.2d 1262 (2nd Cir., 1969).

v. Newman, 468 F.2d 791 (5th Cir., 1972).

Another point relative to Appellant's claim of an insufficient showing of opening net worth is the complete lack of evidence by which the jury could assess Appellant's net worth at the beginning of each of the prosecution years. Dupree v. United States, 218 F.2d 781 (5th Cir., 1955). The Government's proof, in effect, casually treated the five calendar years in question as one period during which Appellant allegedly spent money which he derived from taxable income. Appellant herein suggests that it was necessary for the Government to show opening net worth as to each of these years so that the jury could properly determine whether the expenditures were earned in that year or had come from income accumulated in another prosecution year. In other words, if the Government's proof was sufficient as to the year 1967, there was no basis on which to find that the monies spent in 1968 were not derived from unreported income in 1967.

The United States Supreme Court in Holland v. United States, supra, was fully acquainted with this problem. In reviewing the parent net worth theory of proof, the Court made the following observation:

> "The statute defines the offense here involved by individual years. While the government may be able to prove with reasonable accuracy an increase in net worth over a period of years, it often has great difficulty in relating that income sufficiently to any specific prosecution year. While a steadily increasing net worth may justify an inference of additional earnings, unless that increase can be reasonably allocated to the appropriate tax year, the taxpayer may be convicted on counts of which he is innocent." 348 U.S. at p.129

While some cases may provide sufficient proof on which a finding could be made that the non-reported income was allocable to a particular year, no such proof exists in the case at bar. Absent such proof, the jury was left to merely assume that sufficient gross income was earned in each year which would require Appellant to file. An assumption of this nature is entirely inconsistent with the presumption of innocence.

This phenomenon is especially acute in the instant case because the defendant received four consecutive one-year terms of imprisonment on each of the prosecution years 1967 through 1970. This sentence represents a serious disparity in sentences on income tax failure to file cases.[8] Appellant is aware that

---

[8] For example, one study supplied to the Second Circuit Committee on Sentencing Practices indicates that of some 998 defendants sentenced on income tax convictions in 90 District Courts, only 49 defendants received a sentence in excess of three years. This statistic includes felonious evasion convictions. (A 538)

this Court does not review a sentencing judge's discretion. United States v. Del Toro, 513 F.2d 656 (2nd Cir., 1975). The fact, however, that the evidence in this case cannot support, under any analysis, successive convictions because it cannot be determined in which year the income was alleged to have been earned, allows this Court, it is submitted, to consider the consecutive sentence factor.

POINT II

ADMISSION OF APPELLANT'S FAILURE TO FILE TAX RETURNS IN 1963, 1964 AND 1965 AS EVIDENCE THAT HE DID NOT ACCUMULATE FUNDS OVER THESE YEARS, UNFAIRLY ENCROACHED UPON APPELLANT'S PRESUMPTION OF INNOCENCE.

As previously developed, the Government, again over objection of defense counsel, was permitted to establish that Bianco had failed to file income tax returns in 1963, 1964 and 1965. As distinguished from the "prior similar act" theory, under which the year 1966 was admitted, admission of these three years was designed to create a presumption that Bianco, since he did not file, earned less than $600 in each of those years and, therefore, was in no position to accumulate a cash reserve which could be spent during the prosecution years. When this evidence was introduced, the Court gave the following

explanatory instruction:

> "The prior years of proof [1963 through 1965], as I understand it, is being offered by the government to show you that the defendant did not have income in excess of $600 or had he had income in excess of $600 in any of such years, he would have been required to file a return and this is proof to negative the fact that he had income in excess of that amount." (A 471)

In his final instructions to the jury, the Court charged as follows:

> "As I also indicated to you yesterday, the fact, if you find the same to be a fact, that the defendant filed no income tax returns for the years 1963, 1964, and 1965 may be considered by you in determining whether the defendant had any funds accumulated prior to 1966 or 1967 with which to make the expenditures in 1967 through 1971 as well as in 1966. The government asks you to bear in mind that in each of those years, 1963, 1964 and 1965, if the defendant had gross income in excess of $600, he was required by law to have filed an income tax return and the government says it has no record of such filing by the defendant." (A 513)

In claiming that admission of these prior years for this purpose was error, Appellant relies upon this Court's opinion in United States v. Schipani, 362 F.2d 825 (2nd Cir., 1966) and the District Court's decision in United States v. Schipani, 293 F.Supp. 156 (E.D.N.Y., 1968). In the Schipani case, as here, the Government offered proof that defendant did not file tax returns in the pre-indictment years to support the proposition

that defendant had not accumulated any net worth. Although this Court affirmed Schipani's conviction, the introduction of this evidence for the stated purpose was viewed with displeasure. It was stated that:

> "Where, as here, there was so complete and thorough an exhaustion of non-taxable sources for cash, it seems unnecessary to invoke Schipani's presumption of innocence to sanctify the proposition that he earned, during the pre-indictment years, no more than the maximum gross income. . . which a person may receive without being required to file a tax return." 362 F.2d at p.829, 830.

On Schipani's second non-jury trial, held because of the Supreme Court's remand on other grounds, this District Court excluded this evidence. The reasoning was there stated as follows:

> "The second difference [on retrial] is the inapplicability of the 'presumption', relied upon by the government at the first trial, that the defendant, since he filed on [sic] tax return during the pre-indictment years, earned less than the minimum sum required for a tax return - five or six hundred dollars a year. Since he spent considerably more than these amounts, the government argued that he could not have accumulated any net worth during this period. Such an inference is inconsistent with the factual pattern described below. <u>It would beat the defendant's shield of the presumption of innocence into a sword for the government</u>. <u>The Court of Appeals frowned on this approach</u>; <u>the government may not use it.</u>" 293 F.Supp. at p.157 (Emphasis supplied)

The case at bar is even more compelling. Unlike Schipani, the Government here offered no evidence as to Bianco's cash expenditures or net worth during these three years. Therefore, there was no basis on which the jury could assess whether an accumulation of cash was possible or likely. In the instant case, the naked presumption that no cash was accumulated, founded upon the presumption of innocence, was tantamount to an instruction that Bianco was presumed not to have accumulated any net worth. Considering the Government's extraordinarily weak, if at all existent, proof on opening net worth, embracing the presumption of innocence was totally unfair and improper.

It is a fundamental principle of American criminal justice that the presumption of innocence was designed for the protection of a defendant brought to trial. Coffin v. United States, 156 U.S. 432 (1895); In Re Winship, 397 U.S. 358 (1970). There is no authority to suggest that the presumption of innocence is a concept to be shared for the enjoyment of the Government as well as the defendant. The fact that the Government, in this case, had to resort to this presumption clearly illustrates the insufficiency of their case.

POINT III

THE GOVERNMENT FAILED TO OFFER SUFFICIENT PROOF THAT APPELLANT'S EXPENDITURES DID NOT COME FROM OTHER NON-TAXABLE SOURCES.

In cases of this nature, the Government must not only show "with reasonable certainty" that cash expenditures did not spring from prior accumulations of net worth; the Government also had the burden of proving that the expenditures did not come from other non-taxable sources such as inheritances, gifts, loans or other tax-free income. United States v. Penosi, supra. Appellant herein fully understands the perimeters of the Government's burden. In Holland v. United States, supra, the Court stated that:

> ". . .where relevant leads are not forthcoming, the government is not required to negate every possible source of non-taxable income, a matter peculiarly within the knowledge of the defendant."

With this understanding, Appellant nevertheless contends that here, again, the Government's proof was insufficient.

The Government's attempt to negate sources of non-taxable income came through the testimony of Internal Revenue Service Agent Nahmias. Nahmias testified that he was assigned to the case in September of 1971, some three months before the end of the last prosecution year. (A 274) Following his assignment

to the case, Nahmias circularized an inquiry to approximately 100 banks to determine whether there were any accounts in Appellant's name. A random search of a leading brokerage house and a check with the Kings County Clerk's office also failed to disclose any assets held by Bianco. (A 286)[9]

More significantly, Nahmias testified that he checked with the Probate Clerk in Providence, Rhode Island to determine whether there were inheritances from Appellant's parents. (III, T 25) Nahmias concluded his direct testimony by affirmatively stating that he checked all the leads that he had at his disposal concerning sources of income for Appellant. (A 293) Cross-examination, however, revealed a glaring omission in Nahmias' investigation. Although Nahmias knew that Bianco's mother had died in 1967, he never found the record of the mother's estate to determine whether Appellant had received an inheritance. (A 324 - 325) It was further developed that Nahmias failed to check any records in the Kings County

---

[9] The relevance of this search for assets in late 1971 and 1972 is somewhat uncertain. Nahmias' failure to uncover assets at this time certainly did not shed any light on an opening net worth for any of the tax years in question, nor did the fact that Nahmias could not discover any net worth at this time indicate that Bianco had not received any non-taxable income during the previous five years.

Surrogate's Court to determine whether Appellant received any inheritance. Nor did the agent check to determine whether Appellant's wife ever received any inheritances. (A 494)

This was a case where the Government had not sufficiently proved a likely source of income. While such proof may not be required, its absence would seem to increase the Government's burden of negating all possible sources of non-taxable income. United States v. Massei, 355 U.S. 595 (1958). The investigation conducted here was certainly not the "complete and thorough . . . exhaustion of non-taxable sources for cash. . ." found in United States v. Schipani, 362 F.2d at p.829. While such proof may have been sufficient had there been strong evidence of Appellant's net worth, the insufficiency of that proof compounds the failure to make a thorough and exhaustive search of the inheritance records. Under all the circumstances, it is respectfully submitted, the Government's proof is insufficient to sustain the conviction herein.

POINT IV

THE TEN-YEAR MAIL COVER IN THE INSTANT CASE VIOLATED APPELLANT'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE.

On the basis of this Court's recent decision in United

States v. Leonard, --- F.2d --- (2nd Cir., August 28th, 1975), sl.op. p.5843, Appellant, Nicholas L. Bianco, contends that his constitutional right to be free from unreasonable search and seizure was violated by the Government's mail cover directed against him for a period of some ten years. This mail cover was disclosed during the cross-examination of Internal Revenue Service Agent Louis Nahmias. (A 316)

"Q Did you have a mail watch on Mr. Bianco's house?

A Yes, I did.

Q When did the mail watch go into existence?

A I would say probably during 1962.

Q Can you check anything and tell us when it began?

A It is in our files, not here, in our office files.

Q Did you get a court order for that?

A A court order?

Q Yes.

A No." (A 316)

Nahmias, it will be remembered, entered the case in September of 1971. (A 274) His investigation continued throughout 1972. It appears, therefore, that during this ten-year period, Bianco's

mail was examined for leads and information.

Lest there be any doubt that leads and information were obtained relative to this case, the following testimony furnishes the chilling answer:

"Q Did you get any of the names of any of the people who testified here this week from that mail watch?

A Well, from my recollection I would say, yes, I seem to recall that perhaps one or two of the doctors did come from the mail watch.

Q Now you recall that?

A I recall that.

Q Tell us which ones you recall, Mr. Nahmias?

A I believe that Nathan Abraham was his name, it was reflected on the mail watch.

Q Any other names?

A I do not recall.

Q How about any of the insurance companies like Allstate?

A It is very possible, yes. I do not recall but it is possible.

Q How about Great Eastern Insurance Company?

A It is possible, yes.

Q But you do not recall that either?

A I don't recall.

Q How about Arthur Schwartz?

A That may have been also come from there, but I don't recall.

Q How about the dentist, Salter?

A It may have." (A 317 - 318)

The remainder of Nahmias' testimony on this subject displayed equivocation and uncertainty as to which other witnesses came from the mail watch. (A 318 - 321)

Appellant, Nicholas L. Bianco, contends that this case should be remanded to the District Court for a new trial after all fruits and leads from this mail cover have been suppressed. In the alternative, the case should be remanded for a hearing in order for the District Court to evaluate the circumstances under which the mail cover was obtained and determine whether the mail cover constituted an unreasonable search and seizure.

Initially, it must be noted that Appellant's trial counsel did not move to suppress the fruits and leads of the mail cover in the Court below. It is submitted, however, that this Court can properly reach the merits of Appellant's Fourth Amendment claim on the ground that a Motion to suppress at the time of trial would have been futile under the then existing

case law. In United States v. Indiviglio, 352 F.2d 276, 280 (2nd Cir., 1965), it was stated that:

> "Appellate courts often notice error not objected to below when, under the law existing at the time of the trial, objection would have been futile and when error was asserted on review on the basis of a subsequent appellate decision." (Footnote No. 7)

In the instant case, there was just such an occurrance. At the time Bianco was tried, the controlling authority in this Circuit on the legality of mail coverage was found in United States v. Costello, 255 F.2d 876, 881 (2nd Cir., 1958). Referring to the United States Supreme Court's decision in Ex Parte Jackson, 96 U.S. 727 (1878), the Court stated that:

> "We think the Jackson case necessarily implies that without offense to constitution or statute writing appearing on the outside of envelopes may be read and used."

The Costello case turned on a similar set of facts except that in Costello, there was no indication that the mail cover had been conducted for such a long period of time.

In the recent Leonard case, Judge Friendly stated that:

> "It may well be that, in these days of increased concern for the protection of privacy, the statement in Costello should not be read as an absolute, permitting, for example, the govemment to copy the outside of every envelope received by every citizen."

Rejecting Leonard's contention, the Court found that the mail cover in that case had a legitimate purpose and was not unreasonable. Judge Friendly also noted the diminished expectation of privacy with respect to incoming international mails "which are subject to inspection and even in some cases to opening in aid of the enforcement of the customs laws." The instant case is quite different; here domestic mails were involved; here the mail watch was conducted for an intolerable length of time; here the purpose of the mail watch has thus far been undetermined.

On the basis of Nahmias's trial testimony, it has been disclosed only that a mail cover of some ten years duration had been in effect and that at least part of the Government's case was obtained through that effort. Although Appellant first contends that such a broad search is illegal per se, this case at the very least should be remanded to the District Court to determine the precise circumstances under which the mail cover was executed in order to determine whether the steps taken by the Government were constitutionally tolerable.

POINT V

FAILURE BY THE GOVERNMENT TO MEET THE AFFIRMATIVE BURDEN OF DEMONSTRATING NO USE OR DERIVATIVE USE OF IMMUNIZED TESTIMONY IN THE PREPARATION AND PROSECUTION OF THE CASE BELOW REQUIRES REVERSAL AND A DISMISSAL OF THE INFORMATION.

Once again, this Court is faced with the problem of determining whether the Government has improperly used Grand Jury testimony compelled under a state grant of immunity. In 1970[10], Appellant was called as a witness before a New York State Grand Jury sitting in the County of Kings. Mr. Bianco asserted his Fifth Amendment privilege against self-incrimination and was, thereafter, afforded transactional immunity. (A 15) During the course of these Grand Jury sessions, Bianco was asked a number of questions concerning matters which had seemingly no relevance and which were not within the purview of the jurisdiction of a state District Attorney. The very nature of these questions suggest circumstantial support that this testimony may indeed have provided the prime moving force for Mr. Bianco's subsequent tax prosecution. This Court's attention is drawn

---

[10] The Appellant testified on five separate occasions before the Kings County Grand Jury. The following dates are noted: March 24, April 14, April 28, May 14 and June 2, 1970.

specifically to Appellant's Grand Jury testimony on April 14th, 1970:

"Q Do you file income tax returns?

A No." (A 21)

* * *

"Q Do you own a car?

A Yes.

Q Is it a brand new car?

A A 69 Buick.

Q And paid for? That in cash, I presume?

A No.

Q Did you buy it from Kaplan Buick?

A Yes.

Q You haven't filed a tax return for many years now?

A True.

Q Do you realize that when you win money at the track, you are supposed to report it as income? Do you understand that." (A 27)

* * *

"Q How much did you pay for the car?

A Total amount, I don't know. They run --

but it is -- it's a new Buick. Five thousand, fifty-two.

Q Did you pay cash for it?

A No, I didn't. I got it on time payments.

Q Are you paying it off presently?

A Yes.

Q Mr. Bianco, does your wife work?

A No, she is a homemaker.

Q Did you get a loan or is this a loan made directly by Kaplan Buick when you bought the car?

A When I bought the car, the made the arrangements with Bankers Trust." (A 29)

* * *

From testimony taken on April 28th, 1970:

"Q You must win quite heavily at the track, sir?

A I win.

Q I think I asked you this last time. Did you file federal income taxes on your winnings?

A No, I didn't.

Q Do you intend to?

A I don't think so. I don't know. I may and I may not. What is in the future I don't know." (A 40)

* * *

"Q How much rent do you pay approximately, Mr. Bianco?

A I pay $215.00 a month."

* * *

"Q Mr. Bianco, do you pay in cash or by check?

A I pay in cash." (A 42)

Prior to trial, Appellant moved in the District Court for an Order dismissing the instant Information on the grounds that it was predicated upon improper and derivative use of immunized testimony. A pre-trial hearing was held in which the Government relied upon only two witnesses to meet their "heavy burden" of both negation of taint and of affirmatively establishing independent sources.

The first witness called by the Government was Internal Revenue Service Agent Nahmias. Mr. Nahmias was assigned the role of accumulating evidence and determining whether or not there was sufficient facts to recommend a prosecution for violations of the tax laws. (A 48) Turning to the testimony of Mr. Nahmias, a number of interesting facts were revealed. Most importantly, perhaps, was that although Mr. Nahmias could not identify every individual who had been involved in the accumulation of evidence in support of the Government's case,

he did indicate that a vast number of people had participated in the preparatory stages. He was able to name at least twelve individuals that he was personally aware of. (A 55, 57, 67, 98, 110, 112, 122) Furthermore, although he could not recall other specific names, he did indicate that several federal agencies and their employees had participated in the preparation and assimilation of evidence preceding the subject prosecution. (A 67, 77, 79)

The Government, in their attempt to show through Nahmias' testimony that no improper derivative use had occurred, accomplished the exact opposite. In attempting to prove where he had discovered the various investigative and evidentiary leads used in the compilation of his case, Mr. Nahmias disclosed that scores of separate individuals had been involved in the Bianco investigation. Nahmias could not, of course, testify where these other named law enforcement officials had obtained their information. Furthermore, Nahmias revealed that he had not been the "originator" of the Bianco investigation. Rather, it would appear that his assignment came more than a year after the Government had begun to gather evidence in support of a potential indictment. How the Government may now offer one Internal Revenue Agent's testimony to establish that

nowhere "in the depths of his investigative apparatus. . . was (there) some prohibitive use of compelled testimony"[11] exceeds the parameters of reason.

The second witness called by the Government was former District Attorney David Katz, who had actually conducted the Grand Jury examination of Appellant Bianco. The substance of Katz' testimony is a series of vague denials such as "I have no independent recollection;" or "to the best of my recollection." For example, in response to a critical phase of examination by defense counsel concerning a Detective Capabianco, who served as liaison between the Kings County District Attorney's office and the Eastern District Strike Force, the responses of this witness were hardly sufficient to establish conclusively no misuse of immunized testimony. The following except is noted:

> "Q Can you tell us whether Mr. Capabianco asked you any of the questions that you submitted to Mr. Bianco?
>
> A I have no recollection of him asking me but I know he worked with me. He was one of the detectives assigned at the time.
>
> Q To this investigation?

---

[11] Kastigar v. United States, 406 U.S. 441, at 471 (1972).

A Yes."

* * *

"Q Did Mr. Capabianco have access to those minutes?

A Not as far as I know. They were kept in a cabinet and they were sealed. They were sealed in a folder and the District Attorney had access and one clerical girl who had a key but she never went into the file.

Q Did you ever show him those minutes?

A Not to my recollection." (A 153 - 154)

It was certainly crucial to the pre-trial hearing whether or not Mr. Capabianco had requested this District Attorney to discover specific information. Similarly crucial was whether or not Mr. Capabianco or any other members of the State or Federal Government had, during the past four years, access to this testimony. It was incumbent upon the Government to affirmatively establish these facts. To find that the testimony of District Attorney Katz, whose recollection was so extremely vague and who in fact did not know who had access or custody of these minutes for the past four years, satisfies the Government's burden would be to find that no affirmative burden existed.

Under examination by defense counsel, Katz was unable

to provide a reasonable explanation for asking questions concerning federal tax matters. Once again, the Government's proof falls far short of meeting their affirmative burden. The following excerpts are noted: (Hearing on December 6, 1970).

"Q From that point on you asked him about income and whether or not he filed tax returns, am I correct?

A Yes those questions were asked.

Q Thereafter you asked him about his ability to purchase cars, whether he had bank accounts, whether he kept his money and whether he reported this money on his income tax returns, isn't that right?

A Yes those questions were asked, yes.

Q At the time you asked these questions you had had some experience as a prosecutor in the Brooklyn District Attorney's office, am I correct?

A Yes, just about a year.

Q Did you believe at the time sir that you had any jurisdiction over criminal tax matters?

A No I did not. We did not have jurisdiction over tax matters dealing with federal income tax." (A 145)

And later;

"Q On April 28 again you asked him the source of income and whether he filed a

tax return. May I ask you whether on April 28 you were intending to determine whether or not he committed a crime with respect to those questions?

A I wouldn't know, I do not remember why. I remember asking him those questions if that is what you are asking. I could not give you the reason why they were asked.

Q Do you also during that session ask him how much he paid in rent, did you not?

A Yes I did.

Q And you asked him how he pays the rent, didn't you?

A Yes.

Q Were those questions asked to determine whether or not Mr. Bianco had violated a state law, Mr. Katz?

A I could not give you an answer because I do not know, I do not remember why or what purpose those questions were asked for now." (A 149)

The United States Supreme Court in Murphy v. The Waterfront Commission, 378 U.S. 52 (1964) held that a witness compelled to testify under a state grant of immunity could not subsequently be prosecuted by the Federal Government on the basis of that incriminating testimony. The Court, at p.79, stated:

"We hold the constitutional rule to be that

> a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him."

Murphy and its companion case, Malloy v. Hogan, 378 U.S. 1 (1964) abolished the concept of dual sovereignty with respect to compulsory testimony under a grant of immunity. Left uncertain in the wake of Murphy was the vitality of Councilman v. Hitchcock, 142 U.S. 547 (1892). The Murphy court had indicated that when the questioning sovereign was not the prosecutorial sovereign that, upon the demonstration of no improper use of compelled testimony or its fruits, subsequent prosecution did not offend the Fifth Amendment.

Any uncertainty which may have existed with respect to this issue was, of course, resolved in Kastigar v. United States, supra. In Kastigar, the Court specifically held that use immunity was coextensive with an individual's Fifth Amendment rights. However, the majority laid down a strict test to be followed upon a showing by a defendant of previously immunized testimony. The Court held that the Government would have:

> ". . . the heavy burden of proving that the evidence it proposes to use was derived from legitimate independent sources, 406 U.S. 462, (and that) this burden of

> proof, which we affirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony. 406 U.S. 462."

The majority in Kastigar concluded that by superimposing this burden upon a prosecution alleged to have been founded upon some misuse of immunized testimony, that a witness' Fifth Amendment rights would not be compromised. The Court held that:

> ". . . immunity from use and derivative use 'leaves the witness and the federal government in substantially the same position as if the witness had claimed his privilege' in the absence of a grant of immunity." 406 U.S. at p.459-60.

During the course of the pre-trial hearing, a second dimension to the possible abuse of immunized testimony was revealed. Through the examination of Mr. Nahmias, it was disclosed that the United States Attorney charged with the prosecution of this case had, prior to trial, read all of the immunized testimony taken before the State Grand Jury. (A 124 - 125) This revelation now presents the problem as to whether the prosecutor, subsequent to indictment, relied in any way upon the information discovered through the reading

of these minutes.[12] In United States v. Mc Daniel, 482 F.2d 305, the Court was faced with a similar problem of pre-trial knowledge of immunized testimony by the prosecutor. Pointing out the potential that existed for misuse, the Court wrote:

> "Such use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." 482 F.2d at 311.

Finding that it would be an "insurmountable task in discharging the heavy burden of proof imposed by Kastigar," the Court dismissed the indictment.

In United States v. Dornau, 359 F.Supp. 684 (S.D.N.Y., 1973), rev'd on other grounds, 491 F.2d 475 (2nd Cir., 1974), the Court was likewise faced with the dilemma of a prosecutor having read testimony previously elicited under a grant of immunity. In his decision, Judge Metzner observed

> "It is difficult for the court to speculate as to the effect that the reading of the

---

[12] Appellant is aware of the holding by this Circuit in United States v. Catalano (Dellacroce), 491 F.2d 268, at 272 (2nd Cir., 1974). Although the Court declined to adopt the rule that "access to grand jury testimony ipso facto prevents the government from carrying their burden. . .", Catalano is markedly distinct from the case at bar. Dellacroce's testimony before the Grand Jury revealed nothing for it was so "circumspect" he was cited for contempt. Bianco's testimony, however, is actually relevant and highly susceptible to derivative use.

> minutes might have had on the conduct and thinking processes of the assistant charged with the prosecution of the case.
>
> It appears to me that once the subject matter was touched upon in the privileged testimony, and the prosecutor had read it, he could have used it in a variety of ways in his criminal prosecution. The possibility of such use and the impossibility of clearly showing that the use did not occur calls for the holding in this case that the defendants were denied their constitutional protection that their silence would have given them. (Citing Murphy v. The Waterfront Commission)." 259 F.Supp. at p.687.

Thus, finding that only strict adherance to the mandate of Murphy and Kastigar preserved the integrity of the coextensive doctrine, the Court granted the Motion to dismiss the underlying indictment.

Another case which involved the question of the use of immunized testimony during the course of a trial was United States v. De Diego, 511 F.2d 818 (D.C. Cir., 1975). Although the majority opinion only peripherally skirted the immunity problem - turning rather on the abuse of discretion by the court below - the issues raised by the dissent are germaine to the instant proceedings. Judge Mc Gowan, writing the dissent, concurred with the trial court that "[t]he prospects that taint can be removed by hearings [was]. . . dim." Reciting an applicable portion of the record below in support

of this contention, Mc Gowan wrote:

> ". . . you then start questioning whoever is on the stand, talking about what happened inside the doctor's office; and at any moment you ask a question which, on its face, is derivative De Diego's immunity statement. The whole trial stops; doesn't it? The jury goes out; and we have a hearing about what was in your mind, or whoever is the examining attorney, whether he has some recollection of this, or whether it was De Diego's statement or whether it wasn't. . ." 511 F.2d at p.832.

Analogous to the reasoning alone, it seems a logical impossibility in the case at bar that the United States Attorney can now "affirmatively establish" that he was able to completely obliterate any thoughts which may have reflected knowledge gleaned from this immunized testimony.

The Government has, thus, failed to two respects to satisfy the requirements announced in Kastigar and Murphy. Firstly, they have failed to offer sufficient evidence to establish the negation of taint and to affirmatively prove completely independent sources. Secondly, since the prosecutor read, before trial, the immunized testimony of the Appellant, a virtually undischargeable burden now befalls the Government to prove that no possible use of this information took place.

For these reasons, the Appellant respectfully asserts

that the judgment below should be reversed and the instant Information dismissed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Appellant's conviction herein should be reversed and the Information dismissed or, in the alternative, that the matter should be remanded for a new trial.

Respectfully submitted,

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Defendant-Appellant
NICHOLAS L. BIANCO

JAMES M. LA ROSSA
GERALD L. SHARGEL
Of Counsel

UNITED STATES COURT OF APPEALS
~~FOR THE SECOND CIRCUIT~~

Index No.

UNITED STATES OF AMERICA,

Plaintiff-~~Appellee~~ Appellee,

- against -

NICHOLAS L. BIANCO,

Defendant-Appellant.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1235 Plane Street, Union, N.J. 07083

That on the **16th** *day of* **September** *19* **75** *, deponent served the annexed* Brief

upon **David G. ~~K~~ Trager** *attorney(s) for* **Appellee** *in this action, at* **225 Cadman Plaza, Brooklyn, N.Y.**

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this **16th** *day of* **September** *19* **75**

Eugene L. St. Louis

Print name beneath signature

EUGENE L. ST. LOUIS

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977